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IN THE

Supreme Court of the United States

October Term, 1968

No. 1066

IRVING ROSEN AND SIDNEY A. KANTER,

Petitioners,

—versus—

EASTERN AIR LINES, INC.,

Respondent.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of Case

The petition for writ of certiorari seeks review of the judgment of the Court of Appeals for the Fifth Circuit which affirmed the District Court's judgment for Respondent, Eastern Air Lines, Inc. (Eastern).

Petitioners (Plaintiffs Rosen and Kanter) are former flight attendant employees of Eastern. On May 17, 1965, the petitioners were discharged for their handling of the liquor service on Eastern's Flight 4, on May 13, 1965 (Petitioner Rosen was also discharged for his handling of the liquor service on Eastern's Flight 50 on May 14, 1965). (R. 144, 201).[1]

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[1] References R. are to the Record and S.R. to the Supplemental Record.

The Petitioners filed a grievance with respect to their discharge and the Hearing Officer upheld their discharges on May 28, 1965. (R. 137, 140). Petitioners then submitted their grievances to the Eastern Air Lines Flight Attendants' System Board of Adjustment established pursuant to the Agreement between Eastern and the Air Line Stewards and Stewardesses Association (ALSSA) dated April 15, 1965, and Title II of the Railway Labor Act, 45 U.S.C. 151 *et seq.* (R. 134-140, 79-85).

At the hearing before the System Board of Adjustment and on briefs to that Board, three issues were raised by Petitioners: First, the contention that the letters of discharge did not contain the "precise charges" called for by Section 15-A-4 of the Agreement and that Petitioners had in fact never received any "precise charges" (S.R. 5, 7); second, that under paragraph 13 of the agreement between Respondent and ALSSA establishing the said System Board that Board should only consider and review the record made before the First Stage Hearing Officer and should refuse to permit the Defendant to introduce any additional testimony or exhibits (S.R. 10); and third, that under Section 15 of the basic collective bargaining agreement the First Stage Hearing Officer should have relied solely on the evidence introduced at the hearing before him and that he should not have conducted any investigation and should not have relied on the results of that investigation in making his decision (S.R. 12). No attempt was made to prove that the conduct of the Petitioners on the flights in question did not justify their discharge.

These three defenses were argued vigorously at the hearing, all proffered testimony on these issues was admitted into evidence and an opportunity to brief the issues was extended.

By majority decision dated April 8, 1966, the System Board of Adjustment in an Opinion and Award written by Paul H. Sanders, Neutral, upheld the discharge of the Petitioners (S.R. 1-15). On the specific defenses raised by the Petitioners the System Board of Adjustment held: First, that from May 17 to May 24, 1965 there did exist a "formal defect" in the discharges in that the initial letters of discharge were not precise enough in their charges of misconduct—a "defect" which was remedied by specifications furnished on May 24, 1965. As a remedy, the System Board of Adjustment awarded each of the Petitioners one additional week's pay (S.R. 1, 7-10). Second, the System Board of Adjustment held that under the agreement establishing the System Board of Adjustment the Respondent was entitled to introduce testimony in addition to that introduced before the First Stage Hearing Officer (S.R. 1, 10-12). Third, the System Board of Adjustment held that the Hearing Officer was entitled to make an investigation and to rely on the evidence revealed by that investigation as well as the evidence introduced at the hearing before him in making his decision (S.R. 2, 12-15). On the merits, the System Board held that the evidence in the record clearly established that Eastern was justified in discharging the Petitioners (S.R. 2, 15).

The Petitioners then filed the instant actions asking reinstatement, back pay and punitive damages (R. 1, 100). In their complaints the Petitioners, among other issues, raised again the issue of precise charges and the conduct of the First Stage Hearing Officer, but did not raise directly the issue of whether or not the System Board of Adjustment should have been limited to a review of the record before the First Stage Hearing Officer.

The parties stipulated the record and the District Court after argument found for Eastern (Appendix D to Petition).

On appeal to the Court of Appeals for the Fifth Circuit the Petitioners claimed they were denied constitutional and "industrial" due process because (1) no precise written charges had been filed against them as required by the agreement; (2) under the applicable contract provisions, the Hearing Officer should not have conducted his own investigation, and (3) under the agreement the System Board should not have held a *de novo* hearing, but instead should have limited itself to the record made before the Hearing Officer. The Fifth Circuit in a *per curiam* decision affirmed the judgment of the District Court and denied the Petition For Rehearing and Petition for Rehearing en Banc (Appendixes A, B and C to Petition).

The Fifth Circuit reasoned that all these issues involved questions as to the proper interpretation to be placed on various clauses of the agreement between ALSSA and Eastern and that these questions had been finally decided by the prior decision of the System Board of Adjustment.

Questions Presented

Eastern believes that the questions raised by the petition for writ of certiorari are:

(1) Did the issues raised by the complaint relate solely to interpretation to be placed on various clauses of the basic collective bargaining agreement—issues within the exclusive jurisdiction of the System Board of Adjustment—or did the complaint raise issues of due process reviewable by a Federal Court?

(2) Did the complaint state a cause of action in view of the 1966 amendments to the Railway Labor Act?

While the Petition (p. 3) sets forth some six questions, Eastern submits that they are merely conclusionary allegations, wholly unrelated to the issues raised by the complaint or the appeal to the Fifth Circuit. Thus, there will be no attempt to discuss the purported questions set forth in the Petition.

ARGUMENT

I.

The Issues Raised By The Complaint Relate Solely To The Interpretation To Be Placed On Various Clauses Of The Basic Collective Bargaining Agreement—Issues Within The Exclusive Jurisdiction Of The System Board Of Adjustment—Not Due Process Issues Reviewable By A Federal Court.

It has been settled law since at least 1950 that Adjustment Boards have exclusive jurisdiction over disputes involving the interpretation of collective bargaining agreements under the Railway Labor Act.[2] *Slocum* v. *Delaware, L. & W. R. R.*, 339 U.S. 239 (1950).

Not only do Adjustment Boards have exclusive jurisdiction over disputes regarding the proper interpretation of collective bargaining agreements under the Railway Labor Act, but their decisions as to the proper interpretation are final, binding and conclusive and are not subject to

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[2] A narrow exception to this general rule did exist where an employee was discharged and he sued for damages rather than reinstatement and back pay. In such cases the courts, rather than the Adjustment Board, had jurisdiction. *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941). Even this narrow exception seems now to have been cut off. See *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *Walker* v. *Southern Railway*, 385 U.S. 196 (1966); *Haynes* v. *United States Pipe & Foundry Co.*, 362 F. 2d 414 (5th Cir. 1966).

review by the courts. *Gunther* v. *San Diego & A. E. Ry.*, 382 U. S. 257 (1965). This Court in *Gunther* said (at page 263):

> "III. Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is two fold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot. This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. In *Brotherhood of Railroad Trainmen et al.* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, the Court gave a Board decision the same finality that a decision of arbitrators would have. In *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, the Court discussed the legislative history of the Act at length and pointed out that it 'was designed for effective and final decision of grievances which arise daily' and that its 'statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . .' 360 U.S., at 616. Also in *Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment

> Board provisions were to be considered as 'compulsory arbitration in this limited field,' p. 40, 'the complete and final means for settling minor disputes,' p. 39, and 'a mandatory, exclusive, and comprehensive system for resolving grievance disputes.' p. 38."

The Court went on to say in the *Gunther* case (at page 264):

> ". . . The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court."

While the courts have consistently refused to review interpretations of Adjustment Boards on the merits, they have reserved the right to review the procedure before the Adjustment Board to ensure that grievants received due process. This review has been held to be specifically limited to proceedings before the Adjustment Board and the conduct of the Adjustment Board. *Edwards* v. *St. Louis-San Francisco R.R.*, 361 F. 2d 946 (7th Cir. 1966); *D'Elia* v. *New York, New Haven & Hartford R.R.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd*, 338 F. 2d 701 (2d Cir. 1964).

Moreover, the courts have made it crystal clear that this reservation of jurisdiction to review does not mean that a party can obtain a review of the merits of a decision by presenting the matter in the guise of an allegation of abuse of due process rights. *Bower* v. *Eastern Air Lines, Inc.*, 214 F. 2d 623 (3d Cir. 1954), *cert. denied*, 348 U.S. 871 (1954).

Each of the three points argued by the Petitioners in the appeal to the Fifth Circuit involved only the correct interpretation to be placed on the various clauses of the contract involved. Each of the three points was previously raised before and decided by the System Board.

The Petitioners' argument on the subject of precise charges related solely to Section 15-A-4 of the basic collective bargaining agreement and the interpretation they placed on the language of that Section and the remedy they believed applicable for any violation. The Petitioners' arguments on the extent and type of hearing to be accorded grievants before the System Board were based on paragraph 13 of the agreement between Eastern and ALSSA establishing the System Board of Adjustment and the interpretation they contended should be placed on that paragraph. The Petitioners' argument regarding the investigation and hearing conducted by the First Stage Hearing Officer was based on Articles 15-A(3), (4) and (5) and the interpretations they placed on those paragraphs.

As the decision of the Fifth Circuit points out, the Petitioners did not contend that the System Board of Adjustment in any way acted improperly in arriving at its decisions on those contested issues; they simply contended that the decisions were wrong. A review of the correctness of such decisions is beyond the jurisdiction of the courts even when the courts believe the decision is clearly wrong and even when the results offend their sense of justice. *Hodges* v. *Atlantic Coast Line R.R.*, 363 F. 2d 534 (5th Cir. 1966).

Since the issues raised by the complaint and the issues raised on appeal relate solely to the proper interpretation to be placed on the various contract clauses and do not raise issues of due process, the lower courts were clearly correct in their holdings that the issues raised by the com-

plaint had been submitted to the System Board of Adjustment by Petitioners and decided adversely to them by the Board, and that the decisions on these points were final and binding and not subject to judicial review. The lower courts were also clearly right when they held that they could review only the proceedings before the System Board of Adjustment for the sole purpose of determining that the Petitioners did receive due process and that they could not review the proceedings before the First Stage Hearing Officer.

II.

Under The 1966 Amendments To The Railway Labor Act The Complaint Did Not State A Cause Of Action.

While the Fifth Circuit did not reach Eastern's argument that under the 1966 amendments to the Railway Labor Act the complaint did not state a cause of action, it is submitted that the decision of the District Court could justifiably have been affirmed on that basis.

In *Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) the issue was whether or not the procedures for enforcement of National Railroad Adjustment Board decisions set forth in Title I of the Railway Labor Act were applicable to decisions of airline System Boards under Title II. While the decision of the Court points out that Section 153 was not made applicable to the airlines by Title II, it applied the principles of Section 153 to the airlines as a matter of federal law.[3] The Court said:

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[3] The Petitioners maintain in their brief that the applicable statutory provision is 45 U.S.C. §159(3). That section relates to arbitrations of major disputes over contract negotiations, not minor disputes before Adjustment Boards. *Farris* v. *Alaska Airlines*, 113 F. Supp. 907 (W.D. Wash. 1953), cited by Petitioners as their authority that Section 159(3) applies, points out clearly in Footnote 5 that it is Section 153 that governs the finality of Adjustment Board decisions.

"Adjustment board decisions were expressly made final and binding in the 1926 Act, the National Railroad Adjustment Board awards were made enforceable in the federal courts by the 1934 amendments, and the awards under voluntary arbitration agreements were likewise made expressly enforceable by the statute. There is no reason to believe that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes under existing contracts or that it contemplated awards by adjustment boards the enforceability of which depended entirely upon the desires of the parties or upon state statutes or court decisions. Quite the contrary, the Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it 'intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice.' *Bower* v. *Eastern Airlines,* 214 F. 2d 623, 626 (C.A. 3rd Cir.); *Washington Term. Co.* v. *Boswell,* 75 U.S. App. D. C. 1, 10, 124 F. 2d 244.

"III. The contract of the parties here was executed under §204 and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and *are to be answered with due regard for the statutory scheme and purpose.* To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central

must comply, it is because federal law requires its compliance." (Emphasis added).

Effective June 20, 1966, the Railway Labor Act was amended. Paragraph (p) of Section 3 First—the enforcement procedure—was amended and a new paragraph (q) was added giving any aggrieved party the right to petition a district court for review of an Adjustment Board decision, but severely limiting the grounds of such review. This paragraph reads as follows:

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order

> to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

In view of this Court's conclusion in the *Central Airlines* case that Adjustment Board decisions under Title II of the Act must be enforced in a manner consistent with the "statutory scheme and purpose" of Title I, it is reasonable to assume that the provisions of the 1966 amendments likewise govern the scope of review under Title II and thus apply to this case. *Dominguez* v. *National Airlines, Inc.*, 279 F. Supp. 392 (S.D.N.Y. 1968); *Northwest Airlines, Inc.* v. *Air Line Pilots Assn.*, 373 F. 2d 136 (8th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967).

Although the System Board's consideration of this case was prior to the effective date of the 1966 amendments, those amendments have retroactive effect and govern this appeal. *Railroad Trainmen* v. *Denver Rio Grande Western R.R.*, 370 F. 2d 833 (10th Cir. 1966). See also *Southern Pacific Co.* v. *W. H. Wilson*, 378 F. 2d 533 (5th Cir. 1967) and *Sweeney* v. *Florida East Coast Ry.*, 389 F. 2d 113 (5th Cir. 1968).

The Petitioners have not contended that the System Board failed to comply with the requirements of the Railway Labor Act. The System Board obviously had jurisdiction to decide whether or not the Respondent had complied with Section 15-A-4 of the basic collective bargaining agreement (precise charges); whether or not the First Stage Hearing Officer was in compliance with Section 15 and whether or not the System Board was limited to the record before the First Stage Hearing Officer under the

agreement establishing the System Board of Adjustment. Nor is there any allegation or evidence that any member of the System Board was guilty of fraud or corruption.

Thus, none of the three grounds set forth in the 1966 amendments for setting aside a decision of a Board of Adjustment exists in this case.

CONCLUSION

The Petition for Certiorari fails to establish that customary "considerations governing review on certiorari", as spelled out in this Court's Rule 19, call for grant of the writ in this case. The decision below not only does *not* conflict with a decision of this Court or of any Court of Appeals but, as demonstrated above, it is consistent with the long line of decisions rejecting review of Adjustment Board decisions. The Petition contains no suggestion that the lower courts departed from the "accepted and usual course of judicial proceedings".

This case involves nothing more or less than an attempt to have the Federal Courts rule on the merits of an arbitration decision as to the proper interpretation of various clauses of a collective bargaining agreement entered into under the Railway Labor Act. For almost twenty years this Court has repeatedly and consistently ruled that neither Federal nor state courts may review the merits of such decisions.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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